85-1520

No._____

Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1985

RUSSELL ANDERSON,

Petitioner,

vs.

ROBERT E. CREIGHTON, JR., et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Respondents believe the questions presented by this case can be more accurately and thoroughly stated as follows:

Is the Qualified, or So-Called Good Faith Immunity Defense, Available to a Law Enforcement Officer Who Conducts a Warrantless, Presumptively Unreasonable, Search in Violation of the Fourth Amendment?

Is Summary Judgment Appropriate Before Permitting Discovery When a Rank-and-File Law Enforcement Officer Claims He Is Entitled to Qualified Immunity and the Facts Necessary to Establish the Immunity Are Based on His Own Ex Parte Affidavits?

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JURISDICTION

The Petitioner incorrectly states that the opinion of the Court of Appeals was entered on February 12, 1985. The opinion was filed on July 12, 1985. This does not affect this Court's jurisdiction.

CONSTITUTIONAL PROVISION

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

U.S. CONST. amend. IV.

STATEMENT OF THE CASE

The Petitioner conducted a warrantless, presumptively unreasonable search of the Creighton family's home. The Creightons were not suspected of any crimes. Ultimately, Robert Creighton was beaten then jailed. No charges were filed against him.

The Creightons sued Russell Anderson, the Petitioner, for damages pursuant to Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), alleging he violated their Fourth Amendment rights.

The Petitioner requested an extension to respond to the complaint. Without filing an answer and before any discovery, he moved for summary judgment on the ground that his actions were legal because the search was conducted in exigent circum-

stances. In the alternative, he argued he was entitled to qualified immunity because the law on exigent circumstances was unclear.

The trial court, without permitting discovery, granted the motion, ruling that the Petitioner was entitled to qualified immunity because his actions were not illegal.

The Eighth Circuit Court of Appeals reversed the summary judgment because factual disputes existed concerning whether the Petitioner had probable cause and exigent circumstances. Further, the Court held that the Petitioner was not entitled to qualified immunity because the law on search warrants and exigent circumstances doctrine were clearly established when he conducted the warrantless search of the Creighton's home.

As a caveat, the Court should note that the Petitioner's brief minimizes the factual disputes present in the record. (The Court of Appeals' decision discusses these and they will not be repeated here.) The Court should also note that the "facts" as stated by the Petitioner are developed in the most part from the uncross-examined affidavit of an interested party -- the Petitioner. The lack of discovery denied the Respondents the opportunity to test the truth of the Petitioner's averments.

Finally, the Court should also be aware that the Petitioner himself never stated in his affidavit that he searched the Creighton home pursuant to the exigent circumstances doctrine. Sarisse Creighton said he told her "I don't need a damn search warrant when I am looking for a

fugitive." (Affidavit of Sarisse Creighton p. 6). The memorandum the Petitioner submitted to the trial court also indicates that the Petitioner himself did not articulate that the grounds for the search were exigent circumstances. His counsel's argument was entitled:

> Ex Post Facto Review of Russell Anderson's Actions Shows They Were in Accord With Such Established Statutory or Constitutional Standards as Existed to Guide Him.

(Defendant Russell Anderson's Memorandum of Points and Authorities, p. 8) (emphasis in original).

The Petitioner's statement to Sarisse Creighton indicates that he wrongly believed that he could search for a fugitive with only a fugitive warrant and that he did not need a search warrant. The fact that counsel's exigent circumstances

analysis was "ex post facto" corroborates this point. This leads to the conclusion that the Petitioner did not know of this Court's decision in Steagald v. United States, 451 U.S. 204 (1981), holding that a search warrant is needed to search the homes of third parties for a fugitive, even if the officer has a fugitive warrant.

REASONS FOR DENYING THE WRIT

(1) The Writ Should be Denied Because the Court of Appeals' Decision was Correct.

The Respondents agree that this case presents important questions concerning the proper standard for resolving a claim of qualified immunity by law enforcement officers. However, the Court of Appeals

reached the correct result in answering the question in this case.

a) The Application of the Qualified Immunity Doctrine in this Context Would, In Effect, Change the Long-Established Rule That Warrantless Searches are Presumptively Unreasonable.

First, the application of the qualified immunity doctrine in the context of the exigent circumstances doctrine presents a unique problem. The general rule is that warrantless searches are presumptively unreasonable, see Welsh v. Wisconsin, 466 U.S. 740 (1984), as was the Petitioner's in this case, and that an officer conducting a warrantless search, especially in a home, bears a heavy burden to justify his actions. Id.

The exigent circumstances doctrine turns on the facts and circumstances of each case. Nevertheless, the search is

considered per se unreasonable until proved otherwise by the officer. To apply the qualified, or so-called good faith immunity defense in this context, simply because the exigent circumstances doctrine requires an application of the various factors to the facts at hand, would be to work a substantive change in Fourth Amendment law. This court specifically recognized this issue in Mitchell v. Forsyth, 472 U.S. ___, 86 L. Ed. 2d 411 (1985), where Justice White wrote:

> We do not intend to suggest that an official is always immune from liability or suit for a warrantless search merely because the warrant requirement has never explicitly been held to apply to a search conducted in identical circumstances . . . .

86 L.Ed. at 431 n. 12.

The result of applying the qualified immunity defense in the context of exigent circumstances would be to create a new rule: when in doubt, search. The correct rule is, was, and should be: when in doubt, get a warrant. Permitting qualified immunity in the exigent circumstances context will undermine this Court's policy of promoting the use of search warrants.[1]

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[1]It is relevant to note that at common law, an officer searching for a fugitive with a fugitive warrant was not immune if he entered the home of a third person and the fugitive was not there. Sir Mathew Hale wrote:

> If a justice of peace issue a warrant to apprehend a felon, who is in his own house, and after notice of the warrant and request to open the door it is refused or neglected to be done, the officer may break open the door to take him; and the same law is, if it be but for suspicion of felony.
>
> And so much more may he break

This Court should take especially careful notice that, although this is a civil case, it would be presenting the question of whether the good faith exception to the exclusionary rule developed in United States v. Leon, 468 U.S. ___, 82 L.Ed.2d 677 (1984), applies in the context of exigent circumstances. Justice Brennan, in his dissent in Leon, felt that the application of the good faith doctrine in the context of exigent circumstances would present an extremely difficult constitutional problem. 82 L.Ed.2d at 722.

> open the house of another person to take him, for so the sheriff may do upon a civil process. But then he must at his peril see that the felon be there, for if the felon be not there, he is a trespasser to the stranger, whose house it is . . .

II M. Hale, Historia Placitorum Coronae, (1736), 116-117 (citations omitted)

Although the question presented by this case is of tremendous importance for the Fourth Amendment, the Court should deny the writ because the Eighth Circuit Court of Appeals correctly decided the case. If this Court accepts this case for review, the decision should be affirmed. Acceptance of the Petitioner's position would inevitably damage this Court's policy of promoting the use of search warrants.

b). Because The Court of Appeals Correctly Held that Factual Disputes Precluded Summary Judgment the Issue the Petitioner Presents Would Not Be Reached By This Court If The Writ Were Granted.

The Court of Appeals held that factual disputes precluded summary judgment. This holding was correct and would preclude this Court from reaching the

broader and important constitutional issue raised by the Petitioner.

Although the Respondents have always maintained that even if the facts the Petitioner claims he knew are in fact true, his search was still illegal because the facts fail to establish either probable cause or exigent circumstances to search their home.

In any case, if the facts he averred established probable cause and exigent circumstances, summary judgment was not appropriate for two reasons.

First, those facts are in dispute. (Because the Court of Appeals' opinion discusses these disputes they will not be re-examined here.)

Second, summary judgment should not have been granted on the ex parte affi-

davit of the Petitioner, who was an interested party, without permitting discovery.

The trial court misapplied the dicta in Harlow v. Fitzgerald, 457 U.S. 800 (1982) which indicated that summary judgment may be appropriate before discovery if the law was unclear. This procedure involves a purely legal, not factual, analysis. When a summary judgment motion is based on the facts and circumstances of the case -- as the Petitioner now makes the central theme of his application to this Court -- rather than on the state of the law, the Harlow dicta on discovery is not applicable. In cases involving a claim of exigent circumstance, the law enforcement officers (who will almost ineveitably be the defendants) will possess nearly all the facts necessary to contest the issue. Further, their credi-

bility will be at issue because of their interest in the suit. It is inappropriate and unfair under these circumstances to allow a defendant to establish a defense on his own affidavit without permitting discovery.

Further, a rank-and-file law enforcement officer should not be routinely exempt from discovery. These officers are routinely involved in litigation. These are not high government officials like those in Harlow and Mitchell v. Forsyth, who should be more highly protected from the interference of litigation over undecided issues of law.

The Court should deny the writ because the Court of Appeals correctly held factual disputes precluded summary judgment and because the trial court did not permit discovery.

If the Court granted the writ, it may not reach the broader questions presented by this case because of the factual disputes. However, if the writ were granted the Court should affirm the Court of Appeals because factual issues exist and because discovery was incorrectly denied the Respondent.

(2) The Court Should Deny The Writ Because the Court of Appeals Decision Is Not In Conflict With Decisions Of This Court Or Other Courts of Appeal.

This case involves the application of the qualified immunity defense in the context of a warrantless, presumptively unreasonable, search. The Petitioner has not revealed any decision of this Court or of other Courts of Appeal presenting a similar factual and legal context which conflicts with the decision of the Eighth Circuit Court of Appeals.

The claimed conflict does not exist. The comparison of this case to cases involving due process rights to hearings, warrantless arrests, cruel and unusual punishment cases, et cetera involves faulty reasoning because it fails to take into account the uniqueness of the issue stemming from the subtantive Fourth Amendment law making warrantless searches presumptively unreasonable.

CONCLUSION

For these reasons, the Court should deny the writ.

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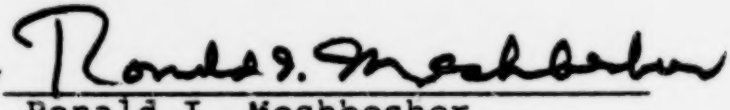
By 

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